

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 4679 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/- and

MR.JUSTICE H.K.RATHOD sd/-

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements? No
 2. To be referred to the Reporter or not? No :
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? No
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the Civil Judge?No :

LUNA ENGINEERING WORKS THRO' SATISHKUMAR PATEL DECD.BY HEIR
Versus
TRISHUL ROCK DRILL

Appearance:

MR MEHUL SHARAD SHAH for Petitioners
MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA and
MR.JUSTICE H.K.RATHOD

Date of decision: 24/01/2000

ORAL JUDGEMENT

1. In this Appeal Notice was issued specifically for settlement returnable on the dates fixed. However, settlement between the parties could not materialise. Learned Counsel for the parties have been heard. The Appeal is admitted. With the consent of the learned Counsel for the Appellant and the respondent the Appeal is being finally disposed of.

2. The Appeal is directed against the Judgment and Decree dated 1.5.1998 of 6th Joint Civil Judge (S.D.), Mehsana, decreeing the Suit of the respondent for recovery of Rs.1,01,001/- with running interest at the rate of 12 % p.a. from the date of the Suit till actual realisation of the decretal amount. Parties were directed to bear their own costs.

3. Brief facts are that the plaintiff is registered partnership firm carrying on business of contract in drilling and executing work of drilling for tube-well. The plaintiff was in need of drilling equipment and therefore demanded quotation from the defendant. The quotation of the defendant was received and written order was placed on 11.8.1989. Under the terms of the contract the defendant was to supply drilling goods as per quotation. The plaintiff had given cash of Rs.51,001/- on 10.8.1989 as advance deposit towards the price of the goods against receipt from the defendant. The goods were to be supplied within 60 days from the written order. Thereafter on 21.8.1989 the plaintiff gave another sum of Rs.50,000/- in cash as deposit with the defendant against receipt. In this way a sum of Rs.1,01,001/- was paid to the defendant by the plaintiff for supply of goods for drilling as per quotation. It was alleged that the defendant did not supply the goods to the plaintiff within 60 days. In view of cordial relations between the parties the plaintiff did not initiate any action against the defendant. Since the goods were not supplied the plaintiff ultimately sent notice on 21.1.1992 by registered Post which was served on the defendant but he did not respond to the notice. As such the plaintiff's Suit was decreed for recovery of Rs.1,01,001/- towards principal, Rs. 36,000/- towards interest at the rate of 12 % p.a. with effect from 10.8.1989. The total worked out to be Rs.1,37,001/- together with interest at the rate of 12 % p.a.

4. In the belated written statement filed by the defendant it was pleaded that as per quotation the plaintiff had to pay 50 % of the total value to the defendant in advance, but the plaintiff did not pay advance amount of 50 %. The defendant firm started

preparing the goods as per quotation but could not deliver the goods because full amount of advance was not paid by the plaintiff. According to the defendant 50 % goods as per order under quotation were prepared and are lying with the defendant who is willing and ready to prepare goods as per quotation and deliver the same to the plaintiff provided the plaintiff pays the price of goods. Denying other allegations made in the plaint the defendant pleaded that breach of contract is committed by the plaintiff on account of which the defendant has to suffer damages, hence the plaintiff is not entitled to any refund.

5. The trial Court found that the plaintiff made advance payment of Rs.1,01,001/-. It further found that the plaintiff agreed to deliver the drilling goods within 60 days after advance payment. It also recorded finding that the plaintiff is entitled to recover Rs.1,01,001/paid as advance to the defendant. The trial Court negatived the defence plea that it was on account of default of the plaintiff that the delivery of drilling goods could not be made. On the point of interest the trial Court found that the plaintiff is entitled to interest at the rate of 12 % from the date of the Suit till realisation, hence the impugned decree was passed.

6. Having heard the learned Counsel for the parties we find no force in the contention of the learned Counsel for the Appellant that whatever amount was deposited by the plaintiff was in the nature of earnest money and as such on breach of contract committed by the plaintiff the defendant was entitled to forfeit the earnest money. He also tried to distinguish the concept of earnest money and advance. After hearing the learned Counsel for the appellant at length we are unable to accept his submission that it was a case of depositing earnest money. On the other hand we agree with the trial Court that the amount was deposited as advance for purchase of goods, namely, drilling equipments, and not that it was deposited as earnest money. Consequently the question of forfeiture of earnest money does not arise.

7. The trial Court found in categorical terms that there is no satisfactory evidence on record as to which side committed breach of contract. We do not find any reason to interfere with this finding of fact which is based on proper appreciation of evidence on record. If there was no cogent evidence on record to determine as to which side committed breach of contract we are unable to hold that necessarily the breach was committed by the plaintiff - respondent in not depositing 50 % of advance.

If this is so then the plaintiff is entitled to refund of advance.

8. The trial Court further found from the evidence on record that it is incorrect to say that the defendant started preparing drilling equipments and at least 50 % of the equipment was ready for delivery. This is also a finding of fact against which there is no reliable material on record on which the Appellate Court can take a different view.

9. In view of above findings we are of the view that the trial Court was justified in returning the finding that the plaintiff deposited a sum of Rs.1,01,001/- as advance with the defendant. On this amount there is no dispute from the side of the defendant.

10. So far as Award of interest is concerned, learned Counsel for the appellant pointed out that in view of cordial relation between the parties and peculiar and pressing financial condition of the appellant it would work in real and great hardship if interest is allowed at the rate of 12 % p.a. from the date of the Suit. It was not disputed by the learned Counsel for the respondent that the relations between the parties were cordial. It was also not disputed that the financial condition of the defendant was not healthy. As such it is to be tested whether u/s.34 of the Code of Civil Procedure award of interest at the rate of 12 % p.a. from the date of the Suit is justified. Award of interest at this rate is nothing but in the nature of pendente lite and future interest till realisation of the amount. Having considered the provisions of Section 34 of the Code of Civil Procedure, cordial relations between the parties and financial stress with the defendant and also consent of the learned Counsel for the respondent we feel that interest of justice will be met if the rate of interest is reduced at the rate of 6 % p.a. from the date of the Suit till realization. In view of this, Appeal succeeds in part only so far as interest amount is concerned.

11. Learned Counsel for the appellant requested that in view of poor financial condition of the appellant he may be permitted to pay decretal amount at the reduced rate of interest in instalments. The request for instalment was not opposed by the learned Counsel for the respondent. We, therefore, accept this request made on behalf of the appellant.

12. In the result the Appeal succeeds in part only and is partly allowed. The Judgment and Decree of the

trial Court is modified to this extent that the decree for principal sum of Rs.1,01,001/- is maintained. However, interest is reduced from 12 % to 6 % from the date of Suit till realization for enabling the appellant to pay the decretal amount. It is hereby ordered that the appellant shall pay a sum of Rs.41,000/- to the respondent within a week from today and shall pay the balance amount in monthly instalments of Rs.17,000/-. First instalment shall fall due on 5th March, 2000. Subsequent instalments shall likewise fall due on 5th day of subsequent english calender months. Final adjustment will be made in the last instalment. Interest at the rate of 6 % p.a. shall continue to be earned till actual payment is made.

In case of default in payment of any two instalments the decree for the balance shall be executable at once.

Parties to bear their own costs.

sd/-

(D. C. Srivastava, J.)

Date : January 24, 2000 sd/-

(H. K. Rathod, J.)

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